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In the Supreme Court of the United States

OCTOBER TERM, 1993

MARVIN ANTHONY POINTER, A/K/A ANT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a sentencing court may determine the reliability of hearsay evidence under the preponderance of the evidence standard.

2. Whether the district court correctly considered hearsay evidence at petitioner's sentencing hearing.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is unpublished, but the judgment is noted at 998 F.2d 1011 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1993. The petition for a writ of certiorari was filed on October 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to distribute controlled substances (21 U.S.C. 846) and possessing heroin with the intent to distribute it (21 U.S.C. 841(a)(1)).[1] The district court sentenced him to a term of life imprisonment on the conspiracy count and a concurrent term of 480 months' imprisonment on the substantive count, to be followed by a five-year period of supervised release if petitioner is ever released. The court of appeals affirmed.[2]

1. Gary Weathers was the key figure in a drug distribution conspiracy that was in existence from January 1984 to September 1990.[3] Weathers began selling cocaine in 1984 and expanded his business into heroin in 1985. Petitioner's co-defendant, Tyrone Staton, was one of Weathers' original drug sources. From Staton and two other sources, Weathers received 200-300 capsules of heroin twice a week for approximately one year. Over his entire drug dealing career, from 1984 to 1989, Weathers received either cocaine or heroin on an average of twice a week. Pet. App. A5-A7; Gov't C.A. Br. 7.

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[1] The original indictment in petitioner's case had charged 14 defendants in 38 counts. By the time of petitioner's trial, six of his co-conspirators had pleaded guilty to various drug offenses, and five other co-conspirators had been convicted of drug offenses at a jury trial. Gov't C.A. Br. 2-3.

[2] Petitioner's co-defendant, Tyrone Staton, was convicted of conspiring to distribute controlled substances and attempting to possess heroin with the intent to distribute it; he was sentenced to a term of 360 months' imprisonment. Gov't C.A. Br. 2, 4-6. The court of appeals affirmed Staton's convictions and sentence. Pet. App. A1-A33.

[3] Weathers testified for the government at petitioner's trial pursuant to a plea agreement. Pet. App. A6; Gov't C.A. Br. 7.

Weathers distributed heroin to Wendell Jones over a nine-month period in 1986.[4] On several occasions, petitioner was with Weathers during drug sales, and petitioner would sometimes hand the drugs to Weathers before the sale. Tyrone Wallace received heroin from Weathers for distribution between 1987 and 1989, and on at least two occasions he saw petitioner receive packages similar to the packages of heroin Wallace was receiving from Weathers. Pet. App. A13-A14; Gov't C.A. Br. 18-19.[5]

In 1988, Staton went to New York on two or three occasions to purchase heroin for Weathers. Each time, Weathers gave Staton $15,000. Weathers discussed drugs on the telephone with petitioner during 1989, and provided petitioner with heroin on several occasions in 1988 and 1989. Pet. App. A10; Gov't C.A. Br. 11-12, 16-17.[6]

2. At sentencing, the district court estimated the total amount of drugs distributed by the Weathers-led conspiracy. The court found that the relevant conduct of petitioner and Staton included 35.5 kilograms of heroin and 39 kilograms of cocaine. Both petitioner and Staton were given three-level enhancements for their roles as managers and supervisors in the conspiracy; petitioner received an additional two-level enhancement for possessing a gun in relation to the conspiracy. On the basis of petitioner's total offense level of 43, the district court sentenced him to life imprisonment. Staton, whose total

[4] Jones, a state prisoner in Virginia, testified for the government at petitioner's trial. Gov't C.A. Br. 18.

[5] Wallace testified for the government at petitioner's trial pursuant to a plea agreement. Gov't C.A. Br. 3 n.1.

[6] The government intercepted Weathers' cellular telephone conversations from May 1989 to July 1989. Recordings of the conversations were played for the jury at petitioner's trial. All of the conversations with petitioner and Staton involved coded discussions of drugs. Pet. App. A8-A10; Gov't C.A. Br. 9-11, 13, 16-18.

offense level was 41, received a sentence of 360 months' imprisonment. Pet. App. A24-A25; Gov't C.A. Br. 23-24, 30-31.

The government's only witness at sentencing was FBI Special Agent James Watters, the case agent, who summarized testimony given at petitioner's trial and at a prior trial of five of petitioner's co-conspirators, as well as statements made by co-conspirators, including Weathers, Jones, and Wallace, at their debriefings.[7] Petitioner offered no evidence in rebuttal; Staton offered only a single affidavit related to the credibility of Weathers. Pet. App. A25-A26; Gov't C.A. Br. 19, 30; Pet. 17, 19.

3. The court of appeals affirmed. Pet. App. A1-A33. The court rejected the claims of petitioner and Staton that they had been sentenced on the basis of unreliable information. *Id.* at A24-A33. The court found no reliability problem with the prior testimony recounted by Watters, because that testimony had been given under oath and subjected to cross-examination by persons with the same motives to discredit the witnesses that petitioner and Staton had. *Id.* at A27. Although the court conceded that the debriefing statements were arguably less reliable, it concluded that, in light of the fact that the debriefing statements were not the core of the government's evidence at sentencing, the district court had not committed clear error in using them to fill out its picture of the conspiracy. *Id.* at A27-A28.

The court of appeals pointed out that petitioner and Staton had pursued the "risky strategy at sentencing" of

[7] After petitioner's trial but prior to sentencing, the judge who had presided at the trial became disabled and a second judge was assigned to conduct petitioner's sentencing. The second judge had not been present at either of the trials involving petitioner and his co-conspirators. Gov't C.A. Br. 5 n.3, 19.

making no effort to rebut the government's hearsay evidence. "Left unrebutted," the court said, " 'reliable' hearsay, corroborated and fleshed out by less-reliable hearsay, is a preponderance of the evidence." Pet. App. A29. Reviewing the evidence presented at sentencing, the court found that the district court did not commit clear error when it determined the relevant conduct and roles in the offense of petitioner and Staton, and enhanced petitioner's sentence for firearms possession. *Id.* at A28-A33.

ARGUMENT

1. Petitioner initially contends that because the district court's consideration of hearsay evidence at sentencing led to a dramatic increase in his sentence, the district court should have assessed the reliability of that evidence under the clear and convincing evidence standard, rather than the preponderance of the evidence standard. Pet. 22-29. That argument is foreclosed by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, this Court "ha[d] little difficulty concluding that * * * the preponderance [of the evidence] standard satisfies due process" as applied to sentencing proceedings. *Id.* at 91. In accordance with *McMillan*, every court of appeals to consider the issue has held that the preponderance of the evidence standard is sufficient for making the various factual findings underlying routine sentencing determinations.[8] The court of appeals in this

[8] See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.), cert. denied, 113 S. Ct. 287 (1992); *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *Frierson*, 945 F.2d 650, 652 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S.

case correctly reached the same conclusion. Pet. App. A25, A32-A33.

As petitioner points out, Pet. 23, the Third Circuit in *United States* v. *Kikumura*, 918 F.2d 1084 (1990), departed from the rule that sentencing findings may always be based on a preponderance of the evidence. In *Kikumura*, the sentencing court departed upward from the Guidelines sentence of 27-33 months' imprisonment to impose a sentence of 30 years' imprisonment. That twelve-fold increase was based on the court's finding that the defendant's offense of conviction was part of a larger, uncharged scheme to commit terrorist acts. *Id.* at 1098-1102; Pet. 23-24. The Third Circuit held that, in light of the exceptional magnitude of the departure, the facts underlying the departure had to be proved by clear and convincing evidence. That heightened standard was necessary, in the court of appeals' view, to prevent the departure from becoming the "tail which wags the dog of the substantive offense." *Id.* at 1101 (quoting *McMillan*, 477 U.S. at 88).

Kikumura has not been followed by any other circuit,[9] and the Third Circuit itself has made clear that

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943 (1989); *United States* v. *Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Payne*, 940 F.2d 286, 292 (8th Cir.), cert. denied, 112 S. Ct. 616 (1991) and 112 S. Ct. 1589 (1992); *United States* v. *Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 498 U.S. 863 (1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990).

[9] The Fifth, Seventh, Eighth, and Ninth Circuits have reserved the question whether they would follow *Kikumura* in an

Kikumura applies only in extraordinary situations. See, *e.g.*, *United States* v. *Miele*, 989 F.2d 659, 663 n.3 (1993). In particular, subsequent to *Kikumura* the Third Circuit has held that sentencing courts should use the preponderance of the evidence standard in determining the applicability of specific offense characteristics and adjustments under the Guidelines. See *United States* v. *Badaracco*, 954 F.2d 928, 935 (3d Cir. 1992); *United States* v. *Frierson*, 945 F.2d 651, 652 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992); *United States* v. *Reyes*, 930 F.2d 310, 315 (3d Cir. 1991). The sentencing enhancement in the instant case arises not from an upward departure (as in *Kikumura*), but from adjustments for relevant conduct (as in *Frierson*), role in the offense (as in *Reyes*), and possession of a firearm during the offense. Furthermore, petitioner has conceded, see Pet. C.A. Br. 45, that he handled at least 516.9 grams of heroin during the conspiracy. That amount alone would result in a base offense level of 28. Sentencing Guidelines § 2D1.1, Table. The district court's ten-level adjustment for petitioner's relevant conduct (which resulted in an offense level of 38) was thus less than half of the 22-level

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exceptional case. See *United States* v. *Billingsley*, 978 F.2d 861, 865-866 (5th Cir. 1992), cert. denied, 113 S. Ct. 1661 (1993); *United States* v. *Trujillo*, 959 F.2d 1377, 1382 (7th Cir.), cert. denied, 113 S. Ct. 277 (1992); *United States* v. *Restrepo*, 946 F.2d 654, 661 & n.12 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1523-1524 (9th Cir. 1992), cert. denied, 113 S. Ct. 2392 (1993); *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991). The courts in *Trujillo*, *Restrepo*, and *Townley* applied the preponderance standard, as have other panels in the Fifth, Seventh, Eighth, and Ninth Circuits. See, *e.g.*, *United States* v. *Masters*, 978 F.2d at 287; *United States* v. *Joetzki*, 952 F.2d at 1096; *United States* v. *Payne*, 940 F.2d at 292; *United States* v. *Casto*, 889 F.2d at 569-570.

increase in the base offense level in *Kikumura*. Accordingly, *Kikumura* is not apposite.

2. Petitioner also contends that the district court erred by basing its enhancement of his sentence on hearsay evidence that lacked sufficient indicia of reliability, and thus deprived him of his rights under the Confrontation Clause of the Sixth Amendment. Pet. 29-41. That fact-specific contention does not warrant this Court's review. In any event, the court of appeals correctly concluded that the information relied on by the district court was sufficiently reliable to be considered at petitioner's sentencing. Pet. App. A26-A28.

It is well settled that at sentencing a district court has wide discretion to determine what information to consider and what weight to give it. As this Court has explained, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The Federal Rules of Evidence are expressly made inapplicable to sentencing hearings. Fed. R. Evid. 1101(d)(3). Moreover, under the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, all reliable evidence is admissible at sentencing. The Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Under the former version of Section 3661, as Congress was aware, S. Rep. No. 307, 97th Cong., 1st Sess. 1219-1220 (1981), the courts had consistently held that even illegally obtained evidence and hearsay (if reliable) could be considered at sentencing. See *Roberts* v. *United States*, 445 U.S. 552, 556 (1980); *United States* v.

Reme, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied, 471 U.S. 1104 (1985); *United States* v. *Lee*, 540 F.2d 1205, 1210-1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).[10]

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court can consider any reliable evidence, including hearsay, at sentencing. Sentencing Guidelines § 6A1.3 (Policy Statement).[11] If there is a question about the reliability of the information available to the court, the Sentencing Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). But once the reliability of that information has been established, the court may use it to determine the appropriate punishment. *United States* v. *Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States* v. *Sciarrino*, 884 F.2d 95, 97 (3d Cir.), cert. denied, 493 U.S. 997 (1989); see *United States* v. *Roberts*, 881 F.2d 95, 105-106 (4th Cir. 1989).

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[10] In determining the appropriate sentence for a particular defendant, the sentencing judge may even consider evidence of crimes for which that defendant has not been convicted. *Williams* v. *New York*, 337 U.S. 241, 244 (1949).

[11] Section 6A1.3 (Policy Statement) of the Sentencing Guidelines provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The accompanying Commentary expressly states that "[r]eliable hearsay evidence may be considered." Sentencing Guidelines § 6A1.3, Commentary.

Petitioner bases his claim on the Confrontation Clause, but every court of appeals that has considered the issue has held that the Confrontation Clause does not apply at sentencing. See *United States* v. *Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992); *United States* v. *Kikumura*, 918 F.2d 1084, 1102-1103 (3d Cir. 1990); *United States* v. *Johnson*, 935 F.2d 47, 50 (4th Cir.), cert. denied, 112 S. Ct. 609 (1991); *United States* v. *Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Silverman*, 976 F.2d 1502, 1514 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1595 (1993); *United States* v. *Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1592 (1993); *United States* v. *Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), cert. denied, 497 U.S. 1038 (1990).[12] It is thus clear that consideration of Agent Watters' hearsay testimony in this case did not, standing alone, violate petitioner's rights under the Confrontation Clause.

To be sure, a court may not rely on "misinformation of [a] constitutional magnitude" at sentencing. *United States* v. *Tucker*, 404 U.S. at 447. There was, however, no such reliance in the present case. Because the sentencing judge was not present at either of the trials involving petitioner and his co-conspirators, he reasonably relied on the testimony of Agent Watters to ascertain the facts presented at those trials[13] or otherwise developed in the course of the investigation of the conspiracy.[14]

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[12] In addition, three other circuits have held that the Due Process Clause does not require confrontation at sentencing. See *United States* v. *Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States* v. *Notrangelo*, 909 F.2d 363, 365-366 (9th Cir. 1990); *United States* v. *Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989).

[13] While it was hearsay as to petitioner, the testimony at the two trials had substantial guarantees of reliability, because it was given under oath and was subject to cross-examination by a party with

According to Watters, petitioner worked with Weathers from 1984 to 1989; Weathers gave petitioner drugs to deliver to clients; Weathers asked petitioner to collect drug debts for him; and petitioner traveled for Weathers in order to arrange drug transactions. Gov't C.A. Br. 20. Weathers told Watters that petitioner "was his closest and most trusted of all his friends, and he was the only friend with whom he could discuss all of his business; how he did it, his business philosophy," and was "a close friend with whom he would share profit, he would give money, he would give trust, and rely on [petitioner] to conduct the business that he needed to be done." *Ibid.*; see *id.* at 49.

Watters said that witnesses at the prior trial of five of petitioner's co-conspirators had testified that petitioner was very closely associated with Weathers and an integral part of everything Weathers did. Gov't C.A. Br. 21. In addition, informants had told Watters that petitioner was Weathers' "first lieutenant," that petitioner picked up heroin for Weathers on a regular basis in 1985, that in late 1987 petitioner was one of three men making heroin runs to New York three to four times a week for Weathers, and that in May or June 1988 petitioner would deliver drugs for Weathers and collect money for him. *Id.* at 21-23, 46.[15]

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interests and motives similar to those of petitioner. See, *e.g.*, Fed. R. Evid. 804(b)(1) (hearsay exception for former testimony).

[14] The debriefing information recounted by Agent Watters had its own indicia of reliability. The information had been recorded at or near the time the statements were made to the agents on standard DEA 6 and FBI 302 (Notes of Interview) forms, and had been corroborated by trial testimony and the taped conversations played at trial. Gov't C.A. Br. 43-44.

[15] Petitioner's 12 recorded telephone conversations with Weathers and other co-conspirators, which were played at peti-

Watters further testified that according to one Marvin Lee Wright, petitioner shot Wright over a drug debt, and that two other witnesses had confirmed Wright's account of the shooting. Watters advised the sentencing court that another informant had told agents of the Bureau of Alcohol, Tobacco and Firearms that the informant had purchased 17 firearms for petitioner and another drug dealer. Although Watters could not determine how many of the guns petitioner actually received, the relevant BATF report stated that the guns had been purchased to be used by petitioner's street dealers for protection against robberies and to be taken to New York to be traded for drugs. Watters estimated that the total amount of drugs distributed by the conspiracy between 1984 and 1989 was 39 kilograms of cocaine and 35.5 kilograms of heroin. He further estimated that petitioner had personally distributed 516.9 grams of heroin in the course of the conspiracy. Gov't C.A. Br. 21-23, 48-49.

On the basis of Watters' testimony, the district court found that petitioner was one of Weathers' top lieutenants, that Watters' estimate of the drugs distributed by the conspiracy was conservative, and that petitioner could reasonably foresee the amount of drugs distributed by the conspiracy. In addition, the district court adopted the recommendation in the presentence investigation report that petitioner's offense level be enhanced by three levels for his managerial role in the offense, and by two levels for his possession of a firearm during the offense. Gov't C.A. Br. 23-24.

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tioner's trial, corroborated the trial testimony and the informant information by revealing petitioner's intimate familiarity with the members of the conspiracy and the manner in which drugs were obtained and distributed. See Gov't C.A. Br. 46.

In light of this record, the court of appeals correctly ruled that the district court did not commit clear error when it considered Watters' account of the prior trial testimony and the corroborated debriefing statements "to complete the full picture of the conspiracy." Pet. App. A28. Accordingly, because Watters' testimony did not constitute "misinformation of [a] constitutional magnitude," *Tucker*, 404 U.S. at 447, due process requirements were satisfied. See *United States* v. *Sciarrino*, 884 F.2d at 97; *United States* v. *Sunrhodes*, 831 F.2d 1537, 1542 (10th Cir. 1987). Review by this Court is not warranted.[16]

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[16] Petitioner claims, see Pet. 40, that the decision below is in conflict with decisions of other courts of appeals, but he cites only *United States* v. *Fortier*, 911 F.2d 100 (8th Cir. 1990), overruled on other grounds, *United States* v. *Wise*, 976 F.2d 393, 401 (8th Cir. 1992), cert. denied, 113 S. Ct. 1592 (1993), to support that assertion. In *Fortier*, however, where the court reversed a sentence based on contested and unverified information in the defendant's presentence report, the court merely applied the same standards governing the admission of hearsay at sentencing that the court below applied. See 911 F.2d at 103-104. Accordingly, *Fortier* does not present a conflict requiring this Court's review.

Petitioner's companion argument, see Pet. 39, that the district court was required to credit Weathers' testimony at petitioner's trial over any debriefing statement he may have made, is likewise without merit. As the court of appeals correctly pointed out, Pet. App. A27-A28, the district court was in a better position "to decide how much weight to assign to various pieces of evidence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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